



Comptroller General  
of the United States  
Washington, D.C. 20548

## Decision

**Matter of:** Schenker Panamericana (Panamá) S.A.  
**File:** B-253029  
**Date:** August 2, 1993

Udo Beume for the protester.  
Bobby G. Henry, Jr., Esq., and Elizabeth DiVecchio  
Berrigan, Esq., Department of the Army, for the agency.  
Christina Sklarew, Esq., and Michael R. Golden, Esq., Office  
of the General Counsel, GAO, participated in the preparation  
of the decision.

### DIGEST

Where protester alleges that agency officials engaged in a bad faith effort to discredit protester, resulting in a nonresponsibility determination that rendered protester ineligible for award under follow-on solicitation, protest is denied; since the record reasonably supports contracting officer's determination that protester's performance record was unsatisfactory; protester has refused to provide details to support its allegations of bad faith; and raised these allegations after bid opening and apparently only after it became aware it might lose the competition based on its prior performance.

### DECISION

Schenker Panamericana (Panamá) S.A. protests the Department of the Army's determination that the firm is nonresponsible and therefore ineligible for award under invitation for bids (IFB) No. DAHC92-92-B-0052. Schenker contends that the nonresponsibility determination is the result of bad faith and bias on the part of contracting officials, who allegedly are distorting the protester's performance record under a previous contract in order to disqualify the firm. We deny the protest.

The IFB was issued on December 30, 1992, by the Army's Directorate of Contracting in Panama for the preparation of personal property for shipment or storage and for performing services required for local movement of personal effects and household goods. The solicitation contemplated the award of an indefinite delivery, requirements-type contract with a base period of 10 months and three 1-year options. The IFB

permitted split awards based on separate performance schedules. Seven firms submitted bids by the bid opening date of January 20. The apparent low bidder was determined nonresponsible and therefore ineligible for award.

Schenker submitted the apparent second low bid. However, its bid was rejected when the contracting officer determined Schenker to be nonresponsible, also based on the contract administration division's assessment of the firm's performance of a contract for the identical services during the period of November 1990 through December 1992. Schenker's performance under that contract was evaluated as unsatisfactory, based on the unsatisfactory quality of the work performed, the firm's failure to perform in a timely manner, unsatisfactory management, a high number of complaints against the company, and problems with claims remaining unpaid by the firm. The contracting officer advised Schenker of its rejection by letter of February 26.

Contracts were awarded to Mantenimiento Aliado, S.A. and Continental Movers, Ltd., as the low, responsible bidders under the IFB's separate performance schedules, and the unsuccessful bidders were notified by letter. Schenker submitted a protest to the Army on March 2, challenging its nonresponsibility determination. On March 29, the agency denied Schenker's protest and this protest followed.

Schenker alleges that the Army acted fraudulently and in bad faith in determining that the protester was nonresponsible. Schenker alleges that the agency's quality assurance personnel made illegal demands of the firm during the prior contract term, asking for "certain courtesies and monetary favors"; when Schenker refused these demands, the quality assurance staff "did everything within their power to destroy Schenker's business and reputation with the U.S. military." Specifically, the protester alleges that the quality assurance personnel unreasonably encouraged Schenker's clients to file complaints against the firm and made bad faith reports that falsely maligned Schenker.

Before awarding a contract, a contracting officer must make an affirmative determination that the prospective contractor is responsible. Federal Acquisition Regulation (FAR) § 9.104-3(c); Engineered Fabrics Corp., B-244566, Oct. 29, 1991, 91-2 CPD ¶ 392. With regard to a prospective contractor's prior performance, the firm must have a satisfactory performance record, and a prospective contractor that is, or recently has been seriously deficient in contract performance, shall be presumed to be nonresponsible, unless the contracting officer determines that the circumstances were properly beyond the contractor's control. FAR § 9.104-1(c); Marathon Watch Co., Ltd., B-247043, Apr. 23, 1992, 92-1 CPD ¶ 384. We will not

question a nonresponsibility determination absent a showing of bad faith by the contracting agency or the lack of any reasonable basis for the determination, since the determination is essentially a matter of business judgment and encompasses a wide degree of discretion. Id. The contracting officer may base his determination upon a reasonable perception of inadequate prior performance, even where the agency did not terminate the prior contract for default or where the contractor disputes the agency's interpretation of the facts, or has appealed an agency's adverse determination. See Becker and Schwindenhammer, GmbH, B-225396, Mar. 2, 1987, 87-1 CPD ¶ 235; Firm Reis GmbH, B-244544; B-224547, Jan. 29, 1987, 87-1 CPD ¶ 72.

The record includes copies of more than 30 written complaints filed with the agency by Army service members whose personal effects or household goods were handled by Schenker. The complaint letters, taken as a whole, describe a pattern of recurrent problems such as the firm's failure to conduct premove surveys, failure to provide adequate packing materials and/or appropriate tools, the failure to keep appointments or complete the work within the time promised, unprofessional or poorly-trained and unsupervised crews, crews who could not speak English, discourteous personnel, and a generally unprofessional attitude characterized by disregard for the property being packed and shipped. Many of the complaint letters described practices that inadequately protected property from damage or breakage, such as dumping household goods into large containers, failing to wrap furniture, stacking unprotected furniture in trucks, dragging unprotected furniture through hallways and stairways, and wrapping fragile goods in single sheets of paper. Several letters described the staff's refusal to unpack goods that had been delivered to their destination in a local move, notwithstanding the firm's contractual obligation to do so; one letter stated that when Army officials instructed the moving crew's foreman to unpack the goods, the crew became surly and started slamming things around, eventually cutting open boxes and up-ending them onto the floor. Many of the letters are from Army personnel with many years of experience in having their goods shipped, who state that they have never had such problems before, and many describe extreme dissatisfaction with the services they received from Schenker. In addition to the complaint letters, the agency report states that many service members made oral complaints in connection with claims that were filed against Schenker.

In addition to the letters of complaint, the record includes a list of 797 claims that have been filed thus far against Schenker for inbound shipments and local moving services

during the 2-year contract period<sup>1</sup>, as well as statements from several agency officials documenting deficiencies in Schenker's performance. The chief of the transportation division states in the report that while he was initially interested in retaining Schenker as a contractor in order to maintain a capability to meet surge requirements (given the relatively low number of competitive sources in the area), he currently feels that the high level of complaints and claims against the firm more than offset any savings their low bid might offer. In addition to the complaints, the Transportation Chief describes a number of problems he discovered when inspecting Schenker's facilities, including a total supply of packing material that only appeared sufficient for a single large household goods shipment; an apparent lack of any storage plan, with crates of unmarked household goods stacked in huge piles that did not allow identification or access to goods in the middle of the stack; and a practice of accepting too many shipments, until the incoming crates exceeded the capacity of the warehouse.

Statements submitted by officials in the quality assurance section, personal property section, and contract administration section further support the Transportation Chief's allegations of contract violations and poor performance by the protester under the previous contract. The report notes that in September 1992, Schenker's performance in managing property was so poor that its warehouse was overflowing with unmarked and separated shipments, until the Army stopped issuing any delivery orders to Schenker for approximately 6 weeks, to allow the firm to process the shipments it had accepted and regain control of its operation.

Based on the record before us, we believe that the contracting officer reasonably concluded that Schenker's prior performance was seriously deficient and not due to circumstances beyond its control. We are not persuaded by Schenker's response to the agency report, in which the firm contends that the performance problems that are described in the record are not characteristic of the firm's performance and do not represent the majority of orders that the firm serviced, but rather represent a distorted picture which is an attempt by the agency to discredit Schenker's reputation. The protester challenges the agency's reference to a number

---

<sup>1</sup>This list of claims does not include any claims from the outbound shipments that Schenker handled because, generally, any losses arising from those shipments would be filed at the point of destination. In addition, the claims listed are limited to those which were filed with the Army, and do not include shipments for Navy, Air Force, or Marine Corps personnel.

of contract discrepancy reports, contending that not all of them should be counted against Schenker and urging that the number of claims is misleading as to Schenker's actual performance. We consider the personal letters of complaint, which generally describe extremely poor performance, and descriptions of deficiencies provided by a variety of officials, to support the agency's view of an unacceptably low level of performance no matter how the claims records are analyzed, and to provide a reasonable basis for the nonresponsibility determination.

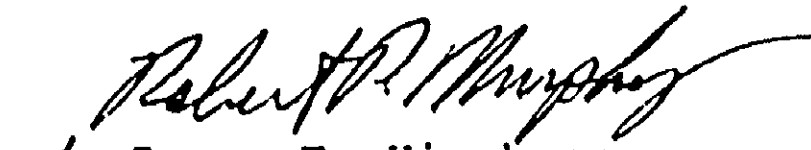
Although Schenker complained in its protest that it received a volume of orders during the period of May through September 1992, that was twice the maximum capacity stipulated in its contract, the report points out that under the contract, Schenker had the option of refusing any order on the basis that it exceeded the firm's contractual obligation; however, it never did so. The protester admits that it has failed to conduct premove surveys, and admits that the firm had a serious shortage of packing materials at various times but contends that the only source of these materials in Panama was unable to meet the demands during the peak season; it does not explain why it continued to accept orders for which its resources were inadequate.

Regarding Schenker's allegations that agency officials engaged in bad faith or fraud by improperly inducing service members to file complaints, we conclude that the documentation in the record--consisting of complaints from so many different sources--far outweighs the protester's unsupported allegations. In addition, we note that the report states that while Schenker claimed in February 1993 (after the completion of its contract) that quality assurance personnel had attempted to demand favors from the contractor in exchange for favorable performance evaluations, Schenker refused to provide any names or details to support these allegations. These allegations were made after bid opening and only after Schenker apparently became aware that it might not be awarded this contract.

To show bad faith, a protester must submit virtually irrefutable evidence that the contracting agency directed

its actions with the specific and malicious intent to injure the protester. Custom Training Aids, Inc., B-241446.2, Feb. 12, 1991, 91-1 CPD ¶ 151. Here, the protester's allegations consisting of generalized statements are not sufficient to support a finding of bad faith.

The protest is denied.

  
for James F. Hinchman  
General Counsel